

J.W., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Duluth, GA, Employer**

Issued: September 10, 2021

Case Submitted on the Record

Office of Solicitor, for the Director

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On October 2, 2019 appellant, through counsel, filed a timely appeal from a July 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the July 1, 2019 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish disabled recurrence of disability commencing August 30 2018 due to her accepted June 12, 2015 employment injury.

FACTUAL HISTORY

On June 12, 2015 appellant, then a 40-year-old postal support employee clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a right upper extremity condition when moving a mail rack while in the performance of duty. OWCP accepted the claim for a right shoulder sprain.

On January 5, 2016 Dr. Neil Negrin, a Board-certified orthopedic surgeon, performed an authorized arthroscopic repair of the right glenoid labrum.

The employing establishment indicated that appellant had bid on a full-time permanent job and was hired on April 30, 2016 as a full-time, full-duty mail processing clerk.

In a September 20, 2017 report, Dr. Negrin diagnosed possible right ulnar neuropathy and cervical radiculopathy affecting the right upper extremity. He provided work restrictions on October 2, 2017 limiting lifting, carrying, pulling, and pushing to 30 pounds and restricting appellant from performing certain work tasks and machines.

Appellant accepted a modified-duty position on October 4, 2017.

In a February 5, 2018 report, Dr. Christopher Haraszti, a Board-certified orthopedic surgeon, noted that appellant was involved in a November 2016 motor vehicle accident with subsequent cervical spine pain. He diagnosed a degenerative tear of the glenoid labrum of the right shoulder, right hand numbness consistent with cubital tunnel syndrome versus cervical radiculopathy, and cervical radiculopathy at C5.⁴

In an August 9, 2018 report, Dr. Haraszti returned appellant-to-modified light-duty work with no overhead lifting or lifting more than 10 pounds with the right arm, no working the delivery bar code sorter, flat sequencing system, or automatic induction machines, and limiting use of the “Speedy” machine to three hours. He prescribed physical therapy and stated that appellant would be reevaluated in six weeks.

In a September 20, 2018 report, Dr. Kevin G. McCowan, a Board-certified surgeon, recounted appellant’s history of injury and treatment. He diagnosed a right shoulder sprain and labral tear and provided work restrictions.

On September 22, 2018 appellant filed several claims for compensation (Form CA-7) for the period August 30 to September 7, 2018, alleging that she was “sent home” as there was no work available within her medical restrictions.

⁴ Appellant participated in physical therapy treatments from May to July 2018.

In a September 22, 2018 letter, an employing establishment supervisor, noted that the employing establishment had accommodated appellant's work restrictions since October 2, 2017. She referred appellant to the accommodations committee "for a potential light[-]duty assignment. However, [appellant] reported back to work with a letter from" OWCP "reflecting approval status dated August 16, 2018." The supervisor noted that appellant was off work from August 31 through September 7, 2018.

On October 9, 2018 OWCP expanded its acceptance of the claim to include a glenoid labrum tear of the right shoulder.

In a development letter dated October 9, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim for compensation for the dates August 30 to September 7, 2018. It advised her of the type of factual and medical evidence needed, including clarification of the dates of disability claimed, and whether she was claiming a spontaneous worsening of the accepted right shoulder injury or a new injury or condition caused by subsequent occupational exposure. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a November 8, 2018 statement asserting that management had made copies of her work limitations and had sent her home as there was no work available within those restrictions. She submitted additional evidence.

In a report dated January 5, 2018, Dr. Awais Butt, a chiropractor, noted that appellant sustained back injuries in an October 5, 2017 motor vehicle accident.⁵

In a May 31, 2018 report, Dr. Haraszi returned appellant to light-duty work with no overhead lifting or lifting more than 10 pounds with the right upper extremity, no or limited use of various machines. OWCP also received reports from Dr. McCowan dated September 20 to October 18, 2017.

Dr. Ellis Efobi, a general practitioner, in a November 19, 2018 report, provided work restrictions.

By decision dated November 30, 2018, OWCP denied appellant's Form CA-7 claims for compensation for the period August 30 to September 7, 2018. It found that there was no medical documentation of record establishing that she was disabled from work for the claimed period due to her accepted employment injury.

On December 11, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review which was conducted April 17, 2019. During the hearing, appellant testified that her physicians modified her work restrictions in August 2018 because of an increase in pain symptoms. She contended that the employing establishment sent her home from work from August 30 to September 7, 2018. Appellant returned to limited-duty work on September 7, 2018 and continued on modified duty.

⁵ Appellant also submitted an October 31, 2017 magnetic resonance imaging scan study of the cervical spine demonstrating an acute C5-6 disc herniation superimposed on multi-level degenerative changes.

OWCP received a December 17, 2018 report by Dr. McCowan, December 27, 2018 and February 1, 2019 reports by Dr. Charles E. Willis, a pain management specialist, and a February 18, 2019 report from Dr. Efobi noting continuing right upper extremity symptoms.⁶

By decision dated July 1, 2019, an OWCP hearing representative affirmed the November 30, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁸ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹ This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹⁰

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.¹¹ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations.¹²

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹³

⁶ Appellant also submitted a March 12, 2019 functional capacity evaluation pursuant to a schedule award claim then under development by OWCP.

⁷ *Supra* note 2.

⁸ *See D.M.*, Docket No. 18-0527 (issued July 29, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁹ *W.H.*, Docket No. 19-0168 (issued May 10, 2019); *see D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁰ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹¹ 20 C.F.R. § 10.5(x); *see V.H.*, Docket No. 18-0456 (issued August 9, 2019).

¹² *Id.*

¹³ *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's June 12, 2015 claim for right shoulder sprain. On October 4, 2017 she returned to light-duty work based on his physician's restrictions. Appellant thereafter filed claims for wage-loss compensation.

In a September 22, 2018 letter, an employing establishment supervisor, noted that the employing establishment had accommodated appellant's work restrictions since October 2, 2017. She referred appellant to the accommodations committee "for a potential light[-]duty assignment. However, [appellant] reported back to work with a letter from" OWCP "reflecting approval status dated August 16, 2018." She noted that appellant was off work from August 31 through September 7, 2018.

In response to OWCP's compensation claim development letter, appellant submitted a November 8, 2018 statement asserting that management had made copies of her work limitations and had sent her home as there was no work available within those restrictions.

The Board finds that the evidence of record is insufficient to determine whether, at the time, a light-duty job remained available for appellant to perform or whether it had been withdrawn resulting in a recurrence of disability. As noted above, OWCP's regulations allow her to establish a recurrence of disability when a light-duty job is withdrawn or when there is a change in her work restrictions.¹⁴ Accordingly, the evidence of record must be fully developed so that it contains accurate information regarding appellant's claim in order to determine whether she sustained a recurrence of disability.¹⁵

It is well established that, proceedings under FECA are not adversarial in nature and, while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ Accurate information regarding whether appellant's limited-duty assignment remained available, is essential to determine whether she sustained a recurrence of disability. OWCP must, therefore, make proper factual findings of whether her limited-duty assignment was still available, and resulted in a recurrence of disability.¹⁷ This evidence is of the character normally obtained from the employing establishment and is more readily accessible to OWCP than to appellant.¹⁸ On remand, OWCP shall request that the employing establishment clarify the circumstances of appellant's cessation of work and whether her modified-duty assignment remained available or had been withdrawn on or about

¹⁴ *Supra* note 12.

¹⁵ *See D.M.*, Docket No. 18-0527 (issued July 29, 2019); *J.G.*, Docket No. 17-0910 (issued August 28, 2017); *M.A.*, Docket No. 16-1602 (issued May 22, 2017).

¹⁶ *D.M., id.*; *Donald R. Gervais*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233 (1983).

¹⁷ *See D.M., id.*; *Y.R.*, Docket No. 10-1589 (issued May 19, 2011).

¹⁸ *D.M., id.*; *J.T.*, Docket No. 15-1133 (issued December 21, 2015); *J.S.*, Docket No. 15-1006 (issued October 9, 2015).

August 30, 2018.¹⁹ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 10, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *K.T.*, Docket No. 17-0009 (issued October 8, 2019).